

**BEFORE THE UNITED STATES  
POSTAL REGULATORY COMMISSION**

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Transfer of Bound Printed Matter  
Parcels to the Competitive Product List

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Docket No. MC2021-78

**SURREPLY COMMENTS OF SCHOLASTIC INC.**

(June 10, 2021)

On March 26, 2021, the United States Postal Service (“Postal Service”) filed a request pursuant to 39 U.S.C. § 3642 and 39 C.F.R. § 3040.130 *et seq.*, that Bound Printed Matter (“BPM”) Parcels be transferred from the Market Dominant product list to the Competitive product list.<sup>1</sup> The Commission requested comments on the requested transfer in Order Nos. 5856 and 5880. Scholastic Inc. (“Scholastic”) filed comments on May 17, 2021, supported by a careful economic analysis, demonstrating that the transfer is contrary to the governing statute, is not factually supported, and would cause significant harm to Scholastic and to its customers who are educators and their students of modest means, and rely on obtaining Scholastic’s books and other educational materials at affordable prices.<sup>2</sup> Scholastic’s comments were supported by comments from hundreds of educators beseeching the Commission to deny the transfer, as it would cause significant harm to their mission of bringing affordably priced books to students, particularly those of modest means.

Nearly three weeks later the Postal Service moved the Commission to accept unauthorized reply comments.<sup>3</sup> The Postal Service’s Reply Comments do not provide the Commission any new information or analysis. They do not even attempt to address Scholastic’s economic analysis or much of the legal precedent Scholastic cited and relied on. The Reply Comments do not deny that the Postal Service has the

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<sup>1</sup> United States Postal Service Request to Transfer Bound Printed Matter Parcels to the Competitive Product List (Mar. 26, 2021)(“Request”).

<sup>2</sup> Comments of Scholastic, Inc. Opposing the Transfer of Bound Printed Matter Parcels to the Competitive Product List (May 17, 2021)(“Scholastic Comments”).

<sup>3</sup> Reply Comments of the United States Postal Service (June 4, 2021)(“Reply Comments”).

power, were its request granted, to dramatically increase the BPM rates Scholastic and others would have to pay. Nor does the Postal Service deny that it intends to do exactly that if it is successful in this docket.

The Postal Service instead presents 15 pages of argumentation (almost as long as its original filing) mischaracterizing Scholastic's position and the relevant law, denigrating the hundreds of educators who took the time to participate in this docket, and arguing that because Scholastic is a profitable company it has no right to protect itself from the Postal Service's exercise of market power.<sup>4</sup> The Postal Service further argues that Scholastic, again because it is a profitable company, has the obligation to protect the students and educators who would be hurt by that exercise of market power by absorbing any substantial price increases itself.<sup>5</sup> The Postal Service's response would be insufficient even apart from its *own* obligation to take into account the "educational, cultural, scientific, and informational value to the recipient of mail matter." *See* 39 U.S.C. § 3622(c)(11). The Request should be denied in its entirety or, at a minimum, the Commission should find that the Postal Service has failed to justify the transfer of educational multi-component bundles, a subproduct within BPM Parcels.

**1. The Postal Service Does Not Deny That It Would Have The Power To Raise Prices On BPM Parcels Far Beyond Levels Demonstrating Market Power, Or Make Any Effort To Challenge Scholastic's Economic Analysis**

Scholastic's comments pointed out that the Postal Service's own pricing impact analysis showed that it could substantially increase current prices without losing enough volume to make the price increase unprofitable.<sup>6</sup> Indeed, the Postal Service's *own* analysis shows that [REDACTED]

[REDACTED]

[REDACTED].<sup>7</sup> This alone demonstrates the Postal Service exercises sufficient market power

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<sup>4</sup> *See* Reply Comments at 4-5.

<sup>5</sup> *See id.*, at 8-9 ("Whether Scholastic passes those costs along to book buyers is a matter entirely under its control."). *See, e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968)(antitrust defendant generally not allowed to defend against an overcharge suit by claiming that the overcharge was "passed on").

<sup>6</sup> *See* Scholastic Comments at 8 & App. A.

<sup>7</sup> *See id.*

under Section 3642(b)(1) and is sufficient evidence on which to deny the Request.<sup>8</sup> Scholastic's comments went further, showing that in the Standard Mail Parcels transfer case (now called Parcel Select Lightweight), involving a similar, light-weight, destination-entered ground parcel product, the Postal Service made the very same arguments it makes here about effective competition and the lack of sufficient market power, yet the actual pricing experience in the 10 years since the transfer demonstrates conclusively that the Postal Service had and still has sufficient market power to profitably impose huge price increases unconstrained by competitive forces.<sup>9</sup> The Postal Service's Reply Comments fail to meaningfully address any of these issues. The Postal Service does not deny that it will have the power to significantly increase prices or even mention the precedent Scholastic cited on the point, much less deal with it.

The Postal Service argues that the SSNIP test is not relevant to market power but only to market definition, even though both the Commission and the courts have consistently held that failing this SSNIP test is strong evidence of market power.<sup>10</sup> Again, the Postal Service ignores this precedent and the plain language of Section 3642(b)(1). The fact that the *Merger Guidelines* use the test to assess market definition is, in this context, beside the point -- if a product is not in the market because customers cannot reasonably turn to it in the event of a 5-10 percent price increase then it cannot, by definition, constrain the exercise of market power. A party with a substantial share (or all) of the market that remains is thus properly inferred to have market power. The Postal Service's argument on the point is mistaken and inconsistent with precedent, and the Postal Service does not cite a single court or agency that has adopted it.

The Reply Comments then attempt to explain away the Postal Service's concession that it has market power.<sup>11</sup> As Scholastic's comments pointed out, monopoly power is a higher standard than market

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<sup>8</sup> See Docket No. MC2012-14, Order No. 1448 (Aug. 23, 2012) at 24-25 (quoting Department of Justice/Federal Trade Commission *Horizontal Merger Guidelines* establishing that the ability to impose a small but significant non-transitory increase in price ("SSNIP") of 5-10% establishes market power); *CF Industries, Inc. v. Surface Transportation Board*, 255 F.3d 816, 821-24 (D.C. Cir. 2001) (holding that a 20% increase is "well above the standard usually employed to signal a substantial degree of market power," citing the *Merger Guidelines*' use of a "5% or 10% differential").

<sup>9</sup> See Reply Comments at 9-13.

<sup>10</sup> See *id.*, at 9-10.

<sup>11</sup> See *id.*, at 10-12.

power, making entirely illogical the Postal Service's attempts to explain away its concession by arguing it does not have monopoly power.<sup>12</sup> The Postal Service now argues that market power and monopoly power are on a continuum, a point no one has contested and that does not help it in any event. The Reply Comments again concede that the Postal Service has "*some* market power in the BPM Parcels market," and then assert without any legal or evidentiary support that it does not have "*sufficient* market power to meet the definition of a Market Dominant product in 39 U.S.C. § 3462(b)(1)."<sup>13</sup> The unsupported assertion that the Postal Service lacks "sufficient" market power is contradicted by the Postal Service's *own* analysis showing that it could impose highly profitable price increases [REDACTED], easily meeting the applicable test of market power. Again, the Reply Comments fail to address or refute this evidence.

The Postal Service cannot deny the uncontested fact that it imposed significant price increases on Parcel Select Lightweight Parcels after the product transfer in 2012. Rather it attempts to wave the point away by arguing that Parcel Select Lightweight does not compete in the same market as BPM Parcels.<sup>14</sup> Scholastic has already noted that it has no reasonable alternative to BPM Parcels, including its educational content multi-component bundles; therefore, the Postal Service's confirmation that Parcel Select Lightweight is yet another product that does not compete with BPM Parcels is both unhelpful to its case and irrelevant. The point Scholastic and others made in the initial comments is that the Postal Service made similar arguments regarding a similar product in a prior case. It is clear in hindsight that the Postal Service's arguments with respect to its market power over Parcel Select Lightweight Parcels were incorrect. In fact, there was and is insufficient competition for the Parcel Select Lightweight product to restrain the Postal Service from instituting price increases averaging [REDACTED].<sup>15</sup> If anything, the recent 20 percent price increase on Parcel Select Lightweight, a product with a much higher price, suggests that if the Commission approves this transfer it should expect even larger price increases for

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<sup>12</sup> See Scholastic Comments, at 6 (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992)).

<sup>13</sup> Reply Comments at 12 (emphasis in original).

<sup>14</sup> See *id.*, at 12-13.

<sup>15</sup> See Scholastic Comments, at 10-11 & Fig. B.

BPM Parcels. This is not a “collateral attack” on the prior decision. This is a separate docket to be decided on its own facts. Nevertheless, the Parcel Select Lightweight experience serves as a cautionary tale and the Commission should view with appropriate skepticism the Postal Service’s attempt to justify another product transfer with the same unsupported arguments that have been proven erroneous by experience.

Finally, the Postal Service mischaracterizes Scholastic’s argument as saying that a “loss of volume is not significant because there is no evidence showing that the Postal Service would lose this volume to other firms offering similar products.”<sup>16</sup> Scholastic’s actual point was that the Postal Service’s own pricing impact analysis had presented no evidence to show that its market power was constrained by the potential “loss of business to other firms offering similar products” as required by Section 3642(b)(1). That is not surprising given the substantial price differential between BPM Parcels and UPS and FedEx Ground products, but it is alone sufficient to deny the Request. Scholastic need not identify the firms to whom the Postal Service would lose business if it raised its prices; rather, it is the Postal Service’s burden under Section 3642(b)(1) to show that substantial price increases would result in the loss of business “to other firms offering similar products.”<sup>17</sup> The Postal Service has not met this burden. The Postal Service’s own analysis shows the opposite; it would retain enough volume to make substantial price increases profitable.

**2. The Postal Service Does Not Address The Evidence Of Record That Customers Such As Scholastic Have No Reasonable Alternatives To BPM Parcels, And Ignores The Applicable Legal Standards On the Point.**

The direct evidence in this case, including the Postal Service’s own pricing and competitive market analysis, establish that there is no effective competition from other providers sufficient to constrain the Postal Service’s exercise of its market power. The Reply Comments offer no persuasive analysis to challenge this conclusion.

Scholastic’s comments demonstrated that the Postal Service has failed to prove there is effective competition for BPM Parcels such that it and other mailers have reasonable alternatives. Scholastic

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<sup>16</sup> Reply Comments at 14.

<sup>17</sup> See 39 U.S.C. § 3641(b)(1).

presented an economic analysis, which the Postal Service ignores, demonstrating that its mailing costs would increase substantially for both the book orders it fulfills using BPM Parcels and for its educational, multi-component bundle BPM Parcels, and that Scholastic would have no alternative but to pay these dramatically increased costs.<sup>18</sup> Scholastic would have to pay nearly three times as much to ship its book orders via UPS and FedEx Ground rather than the current BPM Parcel price, and over four and a half times as much for a typical educational, multi-component bundle.<sup>19</sup> This analysis demonstrates that the UPS and FedEx Ground products are not effective substitutes for BPM Parcels, and that the Postal Service could substantially increase prices on BPM Parcels without risk of losing business to other firms offering similar products. The Postal Service asserts, without any analysis or support, that Scholastic can simply put these items in boxes,<sup>20</sup> but Scholastic demonstrated with supporting analysis that it would have to retool operations and to ship these materials in cardboard boxes to use private carriers and that the cost of doing so would be prohibitive.<sup>21</sup>

The Postal Service's Reply Comments leave other key parts of Scholastic's case unrebutted as well. As Scholastic pointed out in its comments, the Postal Service has conceded that it never analyzed whether the BPM Parcel product meets the statutory definition of a market dominant product,<sup>22</sup> and its Reply Comments do not cure this deficiency. Scholastic also pointed out that the Postal Service's statement that the UPS and Fed-Ex Ground products are "in fact, interchangeable" with BPM Parcels is contradicted by its statement that comparing the products would be an "apples to oranges comparison" because they are not comparable.<sup>23</sup> Indeed, the Postal Service own competitive analysis [REDACTED]

[REDACTED]

[REDACTED]. The Reply Comments ignore this evidence.

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<sup>18</sup> See Scholastic Comments, at 17-19 & Figs D & E.

<sup>19</sup> See *id.*

<sup>20</sup> See Reply Comments at 4. The same argument could be made for virtually any postal product. A newspaper could also be placed in a container and shipped via UPS or FedEx Ground, but it does not follow that UPS and FedEx Ground provide realistic competition for products shipped at Periodicals rates.

<sup>21</sup> See Scholastic Comments, at 2, 26-27 (noting that the cost of the boxes could equal the postal costs).

<sup>22</sup> See *id.*, at 16 (citing Postal Service Response to ChIR No. 3, Question 9).

<sup>23</sup> *Id.* (citing Response to ChIR No. 3, Question 5.c.).

Finally, Scholastic pointed out that the Postal Service's reference to UPS's ability to provide last-mile service was of no help to Scholastic because of the price differential between BPM Parcels and UPS and FedEx Ground products and because private carriers do not have "sufficient delivery density" in the many rural locations where Scholastic ships to educators and students to fulfill its educational mission.<sup>24</sup> The Postal Service's argument that customers could protect themselves by building out their own logistics networks is likewise of no help to customers such as Scholastic who cannot do so. Scholastic cited judicial precedent holding that such customers were entitled to protection as a relevant submarket,<sup>25</sup> but the Postal Service ignores this as well, except to assert that Scholastic's reliance on well-supported economic analysis and well-established law protecting customers in submarkets from the exercise of market power is somehow a plea for "special treatment."<sup>26</sup>

As with the market power point, instead of dealing with any of the evidence of record, the Postal Service's Reply Comments offer only argumentation. The Reply Comments restate the truism that products need not be identical to be reasonably interchangeable.<sup>27</sup> Scholastic never argued that competitive products must be identical, but set forth extensive economic analysis, which the Postal Service does not even address, showing that the products the Postal Service asserts are reasonable substitutes are not.

Scholastic also showed that educational, multi-component bundles meet the test for a product submarket set out in *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962). The Postal Service does not address this point either. The Postal Service misreads *Brown Shoe* to state, "the relevant market is defined by the producers, not the consumers, of the product in question."<sup>28</sup> *Brown Shoe* says no such thing; the very page cited states that a product market is determined by "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."<sup>29</sup> The reference here is to

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<sup>24</sup> *Id.* at 17 (quoting Request, at 12).

<sup>25</sup> *See id.*, at 17, 23-24 (citing *FTC v. Cardinal Health*, 12 F. Supp. 2d 34 (D.D.C. 1998)).

<sup>26</sup> Reply Comments at 2-3.

<sup>27</sup> *See id.*, at 1-2.

<sup>28</sup> *Id.*, at 3 (citing *Brown Shoe*, 370 U.S. at 325).

<sup>29</sup> *Brown Shoe*, 370 U.S. at 325.

interchangability of use by *customers*,<sup>30</sup> and cross-elasticity of demand is a measure of *customer* sensitivity to price changes.<sup>31</sup> The Postal Service’s discussion as to the relevant market or submarket in the first four pages of its Reply Comments is thus wrong as a matter of law<sup>32</sup> and is otherwise unsupported by any factual evidence.

The Postal Service Reply Comments attempt to rehabilitate the argument that “hybrid” products offered by resellers that use the Postal Service itself for last mile delivery provide effective competition. The Postal Service’s argument rests on the unsupported statement that “[f]rom the point of view of the customer . . . these entities are in competition, whether or not the customer knows that these services use the Postal Service for last-mile delivery.”<sup>33</sup> Whatever the truth of this assertion, it ignores the fact that the sellers of those products cannot constrain the Postal Service’s exercise of market power if they rely on the Postal Service itself to provide the product. Those sellers would have to absorb any price increase the Postal Service imposes, which they cannot do profitably in a competitive market, or pass the price increase along to their customers, allowing the Postal Service to raise its own prices. This is one reason why, as Scholastic pointed out in its comments, a company cannot be considered under the antitrust laws or the plain language of Section 3642(b)(1), to compete with itself.<sup>34</sup> The Postal Service remains free to set the price of that product that the resellers must take, and those resellers cannot offer a competitive alternative that would constrain the Postal Service’s pricing.<sup>35</sup>

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<sup>30</sup> The point is made explicitly in the *du Pont* case on which the Postal Service also purportedly relies. See *United States v. E.I. Du Pont de Nemours Co.*, 351 U.S. 377, 395 (1956)(the relevant market must include all products “reasonably interchangeable by consumers for the same purposes.”)(emphasis added).

<sup>31</sup> See *DuPont*, 351 U.S. at 400 (“If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them.”)(emphasis added).

<sup>32</sup> The Postal Service also cites *Newcal Industries, Inc. v. IKON Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008) for the proposition that customers do not define the product market, but *Newcal* cites the holding of *High Technology Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) that market definition depends on “a factual inquiry into the ‘commercial realities’ faced by consumers.” (emphasis added).

<sup>33</sup> Reply Comments at 6.

<sup>34</sup> See Scholastic Comments at 21 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)).

<sup>35</sup> For these same reasons, the extended discussion in the Reply Comments regarding Scholastic’s use of UPS Mail Innovations to ship book fulfillment orders is irrelevant. See Reply Comments at 7-8. Scholastic uses UPS Ground to fulfill book orders weighing over 15 pounds. These shipments are excluded from the BPM Parcel market because they exceed the maximum weight limit of 15 pounds for BPM Parcels. See USPS DMM § 263.2.1.b.



The Postal Service also argues, citing the Public Representative on the point, that “UPS and FedEx have their own end-to-end delivery networks with last-mile capability” and thus must be considered competitors.<sup>36</sup> As Scholastic pointed out in its initial comments and above, the price differential between UPS and FedEx Ground products and BPM Parcels is so significant that the products cannot provide effective competition to protect BPM Parcel shippers. The Postal Service’s own market analysis [REDACTED]. Moreover, as the Postal Service conceded in its Request and as is noted above, these entities have such capability only where there is sufficient delivery density, and Scholastic ships to many rural areas that lack such density; thus, UPS and FedEx Ground products are even less competitive in those areas.

Finally, the Postal Service cites *DuPont* to argue that even if one product is many times the price of another it can be considered competitive because the Supreme Court found DuPont’s cellophane to be reasonably interchangeable with, and to compete with, other similar less expensive products.<sup>37</sup> This erroneous argument has been termed the “Cellophane fallacy.”<sup>38</sup> The error was in failing to recognize that DuPont as a monopolist set its prices above competitive levels at the point where it would start to lose business to lesser cost rivals. In citing *DuPont* to argue that products priced two or three times current levels can be considered “competitive,” the Postal Service has fallen into this fallacy and impliedly conceded that, in having the power to raise prices to those levels before it would start losing significant volume to UPS and Fed-Ex, it would be acting just as the monopolist in *DuPont*.

The Commission has held that “using the overall parcels market as the basis for evaluating market power may not produce meaningful results” because “service providers offer a variety of products within the overall parcels market” that “address different segments of the overall parcels market” so that “all service providers do not compete equally within each market segment.” Docket No. MC2015-7, Order 4009 at 11 (citing the *Merger Guidelines*). All of the evidence of record shows that a similar situation is

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<sup>36</sup> Reply Comments at 6.

<sup>37</sup> See *id.*, at 7-8 (citing *DuPont*, 351 U.S. at 401).

<sup>38</sup> See P. Nelson, Monopoly Power, Market Definition, and the Cellophane Fallacy (June 25, 2015), available at <https://www.justice.gov/atr/monopoly-power-market-definition-and-cellophane-fallacy>).

present here; BPM Parcels do not face effective competition from other segments of the parcel market and should not be transferred to the competitive products list.

### **III. CONCLUSION**

For the reasons stated above and in Scholastic's initial comments, the Postal Service's Request to transfer BPM Parcels should be denied. Even if the Commission determines to approve the BPM Parcels transfer, in part, it should exclude educational multi-component bundles.

Respectfully submitted:

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June 10, 2021